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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

Addendum

Chapter VIII. SETTLEMENT OF DISPUTES

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LEGISLATIVE RECOMMENDATIONS

Disputes between the contracting authority and the concessionaire (see paras. 4-64)

(1) The host country may wish to consider:

(a) Reviewing and, as appropriate, removing unnecessary statutory limitations to the contracting authority's freedom to agree to dispute settlement mechanisms regarded by the parties as suited to the needs of the project;

(b) Reviewing its legislation on the question of sovereign immunity and indicate the extent to which the contracting authority may or may not raise a plea of sovereign immunity, both as a bar to the commencement of arbitral or judicial proceedings as well as a defense against enforcement of the award or judgement.

Settlement of commercial disputes (see paras. 65-76)

(2) The host country may wish to make provisions recognizing the concessionaire's freedom to choose the appropriate mechanisms for settling commercial disputes among the project sponsors, or disputes between the concessionaire and its lenders, contractors, suppliers and other business partners.

Disputes involving other parties (see paras. 77-82)

(3) The host country may wish to consider the desirability of making available special simplified and efficient mechanisms (including arbitration and conciliation) for the settlement of disputes between the concessionaire and its consumers or users of the infrastructure facility.

(4) The host country may wish to adopt legislative provisions that:

(a) Establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body;

(b) Set forth the grounds on which a request for review may be based and the availability of court review.

NOTES ON THE LEGISLATIVE RECOMMENDATIONS

A. General remarks

1. An important factor for the implementation of privately financed infrastructure projects is the legal framework in the host country for the settlement of disputes. Investors, contractors and lenders will be encouraged to participate in projects in countries where they have the confidence that any disputes arising out of contracts forming part of the project will be resolved fairly and efficiently. By the same token, efficient procedures for avoiding disputes or settling them expeditiously will facilitate the exercise of the contracting authority's monitoring functions and reduce the overall cost of the regulatory process.

2. Privately financed infrastructure projects typically require the establishment of a network of interrelated contractual relationships between different parties. Legislative solutions regarding the settlement of disputes arising in the context of these projects must take account of the diversity of relations, and in particular of the fact that the variety of contracts and parties involved may call for different dispute settlement methods depending on the type of contract and parties involved. The legislative considerations underlying any regulation of dispute settlement mechanisms would depend on the types of agreements and contracts and the characteristics of disputes that may arise therefrom. The various agreements and contracts may be divided into three broad categories:

(a) *Agreements between the project company and the contracting authority and other governmental agencies*. The central instrument in an infrastructure project is the project agreement between the host Government and the concessionaire. The project agreement is in many countries subject to a legal regime often referred to as "administrative law", while in other countries the agreement is in principle governed by the law of contract as supplemented by special provisions developed for Government contracts for the provision of public services. This regime may have implications for the dispute settlement mechanism that the parties to the project agreement may be able to agree upon;

(b) *Commercial contracts and agreements concerning the implementation of the project*. These contracts usually include at least the following: (i) Contracts between parties holding equity in the project company (e.g. shareholders' agreements, agreements regarding the provision of additional financing or arrangements regarding voting rights); (ii) Financing and related agreements, which involve, apart from the project company, parties such as commercial banks, governmental lending institutions, international lending institutions and export credit insurers; (iv) Construction contract or contracts between the project company and a contractor, which itself may be a consortium of contractors, equipment suppliers and providers of services; (v) Contract or contracts between the project company and the party who operates and maintains the project facility; and (vi) Contracts for the supply of goods and services needed for the operation and maintenance of the facility;

(c) *Contracts between the project company or the operating or maintenance company on the one hand and the users of the facility on the other*. These users may include, for example, a state owned utility company that purchases electricity or water from the project company so as to resell

it to the ultimate users; commercial companies, such as airlines or shipping lines contracting for the use of the airport or port; or individual persons paying for the use of a toll road.

3. The types of contracts mentioned above in (b) are generally considered commercial contracts to which, as regards disputes settlement clauses, general rules regarding commercial contracts are applicable. Governments wishing to establish a hospitable legal climate for privately financed infrastructure projects would be advised to review their laws with respect to these contracts so as to eliminate any uncertainty regarding the freedom of the parties to agree to dispute settlement mechanisms of their choice, as further discussed in section C (see paras. 65-66). However, in many countries special considerations apply to dispute settlement clauses regarding, firstly, the project agreement between the contracting authority and the project company, and, secondly, contracts between the project company (or the operating or maintenance company) for the sale of goods or services to the end-users of the facility, in particular if the purchasers are State entities or individual persons as consumers. These considerations are discussed below in sections B (see paras. 4-64) and D (see paras. 77-82).

B. Disputes between the contracting authority and the concessionaire

1. General remarks

4. Disputes that arise under the project agreement frequently present problems that do not often exist in disputes arising under other types of contracts. This is due to the complexity of infrastructure projects, the fact that they are to be performed over a long period of time and involve a high level of public interest and the fact that a number of enterprises may participate in the construction and in the operational phases. In addition, disputes under project agreements may concern highly technical matters connected with the construction processes, the technology incorporated in the works and the conditions for operating the facility. Disputes that arise under the project agreement must be settled speedily in order not to disrupt the construction of the facility or the provision of the relevant services. These considerations ought to be taken into account by the parties in determining the dispute settlement mechanisms to be provided in the project agreement.

5. The issue that most frequently gives rise to disputes under the project agreement is whether a party has failed to perform its contractual obligations and, if so, the legal consequences of its failure. However, other questions often arise for which it is advisable to provide an appropriate settlement mechanism in the project agreement. For example, the project agreement may provide for its terms to be changed or supplemented in certain circumstances. Questions may arise as to whether those circumstances have occurred and, if so, how the contractual terms should be changed or supplemented (see chap. V, "Infrastructure development and operation", ___). The project agreement may also provide for the contracting authority to give its consent to certain actions by the concessionaire. If the contracting authority improperly withholds its consent, the question may arise whether an arbitral tribunal or court can substitute its own consent for that of the withholding party. Questions may also arise whether interim measures should be taken pending the final settlement of the dispute.

6. Under some legal systems, courts and arbitrators are not competent to change or supplement contractual terms or to substitute their own consent for a consent improperly withheld by a party. Under other legal systems, courts and arbitrators may do so only if they are expressly so authorized by the parties. Under yet other legal systems, arbitrators may do so but courts may not. Where the law applicable to the contract or to the proceedings does not permit courts or arbitrators to change contractual terms, the parties may wish to provide other means of changing certain terms, when it is feasible to do so. For example, they may provide for the prices charged by the concessionaire to change automatically by means of an index clause under certain circumstances (see chap.V, "Infrastructure development and operation", ___). They may provide for other contractual terms to be changed or supplemented by means of procedures before a third party, such as a referee or a dispute review board (see paras. 21-29). Where courts or arbitrators do not have the power to substitute their consent for a consent improperly withheld by a party, the project agreement may provide that a party may withhold its consent only upon specified grounds, and that, in the absence of those grounds, the consent is deemed to be given. Courts or arbitrators would then have to decide only whether the specified grounds existed.

7. In general, it is desirable for the parties initially to attempt to settle their disputes through negotiation (see paras. 11-12). The parties could, if they so desired, continue to negotiate even after other means of dispute settlement had been initiated. In some cases in which the parties have referred a dispute to conciliation (see paras.13-20) and arbitral or judicial proceedings are thereafter initiated, they might still find it useful to continue with the conciliation. Also, disputes may arise under a project agreement that are not within the legal competence of courts or arbitral tribunals or that cannot conveniently be settled in arbitral or judicial proceedings (for example, disputes of a technical nature that need to be resolved more speedily than is possible in arbitral or judicial proceedings).

8. In practice, it has been found useful for disputes arising under project agreements to be settled by arbitration: a process by which parties refer disputes that might arise between them or that have already arisen for binding decision by one or more independent and impartial persons (arbitrators) selected by them (see paras. 30-59). In general, arbitral proceedings may be initiated only on the basis of an arbitration agreement. The arbitral award is usually enforceable in a manner similar to a court decision. In the absence of an arbitration agreement, disputes between the parties will have to be settled in judicial proceedings (see paras. 60-64).

9. In considering which method or methods of dispute settlement to provide in the project agreement, the parties should ascertain, in particular, the scope of the authority that may be exercised by judges, arbitrators, a referee or a dispute review board under the law applicable to the procedures. They should also consider the extent to which a decision of a referee or dispute review board, arbitral award or judicial decision is enforceable in the countries of the parties. The fact that the contracting authority is often an agency of the Government may also be a factor influencing the method of dispute settlement to be provided.

10. Parties to a complex and long-term contractual relationship such as a project agreement sometimes agree on composite dispute-settlement clauses designed to prevent, to the extent possible,

disputes from arising and to foster reaching agreed solutions and efficient dispute settlement methods, when disputes nevertheless arise. Such clauses typically provide for a sequential series of steps starting with an early warning to the other party of issues that may develop into a dispute unless the parties take action to prevent them. When a dispute does occur the parties are required to exchange information and to discuss the dispute with a view to identifying a resolution. If the parties are unable to resolve the dispute themselves, then either party may require participation of an independent and impartial conciliator to assist them to find an acceptable resolution. If the assistance of a conciliator is not requested, then either party may request the assistance of the previously agreed panel entrusted with dispute settlement powers. As to such a panel, it may be agreed that assistance will first be sought from the chairman of the panel; if the dispute cannot be so resolved, either party may submit the dispute to the full panel or the panel itself may decide to consider the dispute. Only if the steps previously mentioned do not lead to a resolution, either party may commence arbitration or court proceedings, as provided in the dispute settlement clause.

2. Negotiation

11. The most satisfactory method of settling disputes is usually by negotiation between the parties. An amicable settlement reached through negotiation may avoid disruption of the business relationship between the contracting authority and the concessionaire. In addition, it may save the parties the considerable cost and the generally greater amount of time normally required for the settlement of disputes by other means.

12. Even though the parties may wish to attempt to settle their disputes through negotiation before invoking other means of dispute settlement, it may not be desirable for the project agreement to prevent a party from initiating other means of settlement until a period of time allotted for negotiation has expired. Furthermore, if the project agreement provides that other dispute settlement proceedings may not be initiated during the negotiation period, it is advisable to permit a party to initiate other proceedings even before the expiry of that period in certain cases, e.g. where a party states in the course of negotiations that it is not prepared to negotiate any longer, or where the initiation of arbitral or judicial proceedings before the expiry of the negotiation period is needed in order to prevent the loss or prescription of a right. It is advisable for the project agreement to require a settlement reached through negotiation to be reduced to writing.

3. Conciliation

13. If the parties fail to settle a dispute through negotiation, but wish nevertheless to avoid arbitral or judicial proceedings, they may attempt to do so through a process in which a third person is assisting the parties to reach a settlement, often by proposing solutions for their consideration. "Conciliation" or "mediation" are among the expressions that are frequently used for such non-adversarial proceedings. Conciliation differs from negotiations between the parties in that a conciliation is conducted by a third independent and impartial person, whereas in settlement negotiations between the parties no such third independent and impartial person is involved. The difference between conciliation and arbitral or judicial proceedings is that conciliation is voluntary in that both parties participate in it only to the extent that, and as long as, they both so agree.

Sometimes, however, the parties are committed by agreement to strive for a settlement during a specified period of time after the commencement of conciliation proceedings or until an event such as a written statement refusing to settle and declaring the conciliation as terminated. A further difference is that a conciliation ends either in a settlement of the dispute or it ends unsuccessfully, whereas the arbitral tribunal or the court, if there is no settlement, imposes a binding decision on the parties. Conciliation is being increasingly practised in various parts of the world. In many countries a number of private and public bodies have been established offering conciliation services to interested parties.

14. Conciliation is non-adversarial and fosters an amicable atmosphere, which makes it more likely that the parties in dispute will preserve or reinstate a good business relationship between them than in arbitral or judicial proceedings. Conciliation may even improve a business relationship, since the negotiations in the conciliation proceedings, joint fact-finding and the ultimate agreement of the parties may go beyond the confines of the dispute that gave rise to the conciliation and may result in a modified contractual relationship that is better adapted to the commercial reality. Because conciliation makes it possible to prescind with certain formalities that must be observed in arbitral or judicial proceedings, conciliation proceedings are likely to be more speedy and inexpensive than arbitral or judicial proceedings.

15. If the parties provide for conciliation in the contract, they will have to settle a number of procedural questions in order to increase the chance of a settlement and to avoid some of the potential disadvantages of conciliation, which are mentioned below. Settling such procedural questions is greatly facilitated by the incorporation into the contract, by reference, of a set of conciliation rules such as the UNCITRAL Conciliation Rules.[1] Some countries have adopted legislation that is designed to facilitate the use of conciliation in commercial disputes.

16. A potential disadvantage of conciliation is that, if the conciliation were to fail completely, the money and time spent on it would have been wasted. That disadvantage might be reduced to some extent if the project agreement does not require the parties to attempt conciliation prior to initiating arbitral or judicial proceedings, but merely permit a party to initiate conciliation proceedings. Conciliation would thus take place in cases where there exists a real likelihood of reaching an amicable settlement.

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[1] Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 106 (Yearbook of the United Nations Commission on International Trade Law, Vol. XI: 1980, part one, II, A (United Nations publication, Sales No. E.81.V.8)). The UNCITRAL Conciliation Rules have also been reproduced in booklet form (United Nations publication, Sales No. E.81.V.6). Accompanying the Rules is a model conciliation clause, which reads: "Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force." The use of the UNCITRAL Conciliation Rules has been recommended by the United Nations General Assembly in its resolution 35/52 of 4 December 1980.

17. Another potential difficulty may arise from the fact that in conciliation proceedings the parties typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If, despite such efforts, the conciliation does not result in a settlement and the parties initiate judicial or arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. This possibility may discourage parties from actively trying to reach a settlement during conciliation proceedings, which would reduce the usefulness of conciliation. In order to address the problem, some rules (e.g. art. 20 of the UNCITRAL Conciliation Rules) contain a stipulation according to which the parties undertake not to rely on or introduce as evidence in any subsequent arbitral or judicial proceedings (i) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute; (ii) admissions made by the other party in the course of the conciliation proceedings; (iii) proposals made by the conciliator; (iv) the fact that the other party had indicated its willingness to accept a proposal for settlement made by the conciliator. In order to foster conciliation as a method of settling disputes and to ensure that the described difficulties do not arise, some States have adopted legislative provisions restricting the introduction of certain evidence relating to conciliation proceedings into subsequent judicial or arbitral proceedings.

18. A party may be reluctant to actively strive for a settlement in conciliation proceedings if it has to take into account the possibility that, if the conciliation is not successful, the conciliator might be appointed as counsel of the other party or as an arbitrator. The conciliator's awareness of certain facts occurring during conciliation (e.g. proposals for settlement and admissions) might prove to be prejudicial for the party who made them. This is the reason behind stipulations found in some standard conciliation rules (e.g. art. 19 of the UNCITRAL Conciliation Rules) to the effect that the parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings; furthermore, the parties undertake that the parties will not present the conciliator as a witness in any such proceedings. Some jurisdictions, with a view to promoting and facilitating conciliation, have enacted legislative provisions limiting the possibility of a conciliator acting in a related subsequent dispute as counsel, an arbitrator or a witness.

19. Nevertheless, prior knowledge on the part of the arbitrator might be regarded by the parties as advantageous, in particular because that knowledge will allow the arbitrator to conduct the case more efficiently. If this is so, the parties may prefer that the conciliator be appointed as an arbitrator in the subsequent arbitral proceedings. In order to overcome any objection based on assertions of prejudice in those cases, some jurisdictions have adopted laws expressly allowing a conciliator, subject to agreement of the parties, to serve as an arbitrator.

20. A further potential disadvantage of conciliation is the possibility that a party would not live up to the settlement reached in conciliation proceedings. Thus, the attractiveness of conciliation would be increased if a settlement reached during a conciliation would be enforceable similarly as an arbitral award, so that a party to the settlement would not be compelled to initiate adversarial arbitral or judicial proceedings in order to enforce the settlement. A way of making a settlement enforceable may be for the parties to appoint the conciliator as an arbitrator and limit the arbitral proceedings to recording the settlement in the form of an arbitral award on agreed terms (as provided for, e.g., in art. 34(1) of the

UNCITRAL Arbitration Rules). A possible obstacle to this approach, however, may arise in legal systems in which, once a settlement has been reached and the dispute thereby eliminated, it is not possible to institute arbitral proceedings. In order to deal with this obstacle, some jurisdictions have adopted laws that establish the enforceability of settlement agreements reached in conciliation. One possible legislative solution may be to provide that the written settlement agreement should, for the purposes of its enforcement, be treated as an arbitral award and may be enforced as such. Another solution may be for legislation to expressly permit the parties to the settlement, despite the disappearance of the dispute, to commence arbitration and obtain from the arbitrator, who may be the former conciliator, an award on agreed terms.

4. Proceedings before a referee or a dispute review board

21. The parties may wish to consider providing for certain types of disputes to be settled by a third party (referred to in the *Guide* as a "referee") or by a board of experts appointed by both parties. These boards of experts are often referred to, for example, as "dispute review boards", "concession referee boards" or "dispute adjudication boards". Proceedings before a referee or a dispute review board can be quite informal and expeditious, and tailored to suit the characteristics of the dispute that they are called upon to settle. In such a process, the parties may be free to accept or reject the suggestions of the referee or dispute review board and to initiate judicial or arbitral proceedings at any time, especially if such initiation is needed in order to prevent the loss or prescription of a right. The appointment of a referee or dispute review board may prevent misunderstandings or differences between the parties from developing into formal disputes requiring settlement in arbitral or judicial proceedings.

22. Where these procedures are used, if a dispute arises which the parties have been unable to resolve by discussion, either party can refer the dispute to the referee or dispute resolution board for a recommendation or adjudication. Such referral triggers an evaluation by the referee or dispute review board, which is done in an informal manner, typically by discussion with the parties during a regular site visit. The referee or the board controls the discussion, but each party is given a full opportunity to state its views, and the referee or dispute review board is free to ask questions, and to request documents and other evidence. The board then meets privately and seeks to reach a unanimous recommendation or adjudication. Typically, according to the contract provisions establishing the referee or the dispute review board mechanism, the decision of the referee or dispute resolution board is not automatically binding on the parties, but they may stipulate that the decision becomes binding unless one or both parties refer the dispute to arbitration or initiate judicial proceedings.

23. A few international organizations and trade associations have developed rules concerning the use of a referee or a dispute review board in the settlement of disputes, but those rules generally deal with only some aspects of the matter. Many legal systems do not regulate proceedings before a referee. Others regulate them only to a very limited extent. It should also be noted that the law applicable to the proceedings may provide only limited legal safeguards to ensure that the proceedings are conducted impartially and with due care. In addition, under many legal systems, the decision by the referee or dispute review board, while binding as a contract, does not constitute an

executory title, since it does not have the status of an arbitral award or a judicial decision. For these reasons, if the parties contemplate providing for proceedings before a referee or dispute review board, it will be necessary for them to settle various aspects of those proceedings in the project agreement. The main issues to be provided are discussed below.

24. The composition of the dispute review board may vary in the different stages of the project. Each board member should be experienced in the type of project, and in contract interpretation and administration for such projects, and should undertake to remain impartial and independent of the parties. In the construction phase, for instance, these persons may be furnished with periodic reports on the progress of construction and informed immediately of differences arising between the parties on matters connected with the construction. They may meet with the parties on the site, either at regular intervals or when the need arises, to consider differences that have arisen and to suggest possible ways of resolving those differences.

25. It would be desirable for the project agreement to delimit as precisely as possible the authority conferred upon the referee or dispute review board. It may specify the functions to be performed by the referee or dispute review board, and the type of issues with which they may deal. It is desirable to restrict the authority of the referee or dispute review board to issues of a predominantly technical character. A possible way of expressing such a restriction in the contract is to include a list of technical issues with which the referee or dispute review board are authorized to deal.

26. With regard to the nature of their functions, the project agreement might authorize the referee or dispute review board to make findings of fact and to order interim measures. The project agreement might also authorize them to change or supplement terms of the project agreement when they may be permitted to do so under the law applicable to the project agreement (see para. 6). The parties may wish to consider whether the referee or dispute review board should be authorized to decide on the substance of certain types of disputes (e.g. disputes as to whether completion tests or performance tests were successful, or as to grounds asserted by the concessionaire for objecting to a variation ordered by the contracting authority), or whether the settlement of those disputes should be left to arbitrators or courts.

27. To the extent they are permitted to do so by the law applicable to the proceedings, the parties might wish to deal in the project agreement with the relationship between proceedings before a referee or dispute review board and proceedings before a court or arbitral tribunal. For example, the project agreement might provide that disputes within the scope of the authority of the referee or dispute review board must first be submitted to it for resolution and that arbitral or judicial proceedings cannot be initiated until the expiration of a specified period of time after submission of the dispute to the referee or dispute review board. The project agreement should further clarify whether the recommendation or adjudication of the dispute review board is admissible as evidence in any subsequent arbitral or judicial proceedings.

28. The law governing arbitral or judicial proceedings may determine the extent to which the parties may authorize arbitrators or a court to review a decision of the referee or dispute review board. Excluding such review has the advantage that the decision of the referee or dispute review

board would be immediately final and binding. However, permitting such a review gives the parties greater assurance that the decision will be correct. The advantages of both approaches may be combined to some extent by providing that the decision by the referee or dispute review board is binding on the parties unless a party initiates arbitral or judicial proceedings within a short specified period of time after the decision is rendered. If they are permitted to do so, the parties might specify that findings of fact made by a referee or dispute review board cannot be challenged in arbitral or judicial proceedings. The project agreement might also obligate the parties to implement a decision by the referee concerning interim measures or a decision on the substance of certain specified issues; if the parties fail to do so, they will be considered as having failed to perform a contractual obligation.

29. Procedures before referees or dispute review boards have been used in conjunction with adversary dispute settlement mechanisms, such as arbitration. These procedures are being increasingly used in countries where government agencies are by law restricted to resolving contractual disputes by court litigation. Early clauses on referees or dispute review boards did not have provisions making their recommendations binding. In practice, however, the combination of the persuasive force of unanimous recommendations by independent experts agreed by the parties led both contracting authorities and project companies to accept voluntarily the recommendations rather than litigate. Apart from avoiding potentially protracted litigation, the parties often take into account the potential difficulty of overcoming what might be regarded by the court or arbitral tribunal as a powerful recommendation, as it had been made by independent experts familiar with the project from the outset, and was based on contemporaneous observation of the project prior to, and at the time of, the dispute having first arisen.

5. Arbitration

(a) Considerations as to whether to conclude arbitration agreement

30. There are various reasons why arbitration is frequently used for settling disputes arising under privately financed infrastructure projects. Arbitral proceedings may be structured by the parties so as to be less formal than judicial proceedings and better suited to the needs of the parties and to the specific features of the disputes likely to arise under the project agreement. The parties can choose as arbitrators persons who have expert knowledge of the particular type of project. They may choose the place where the arbitral proceedings are to be conducted. They can also choose the language or languages to be used in the arbitral proceedings. Where parties agree to arbitration, neither party submits to the courts of the country of the other party, except to the extent the courts of the place of arbitration may be called upon to intervene in the arbitral process. Arbitral proceedings may be less disruptive of business relations between the parties than judicial proceedings. The proceedings and arbitral awards can be kept confidential, while judicial proceedings and decisions usually cannot. Arbitral proceedings tend to be more expeditious and, in view of their finality, often less costly than judicial proceedings. While some legal systems provide for summary judicial proceedings for certain types of disputes (usually disputes involving relatively small sums of money) many disputes arising in connection with a privately financed infrastructure project will not qualify for settlement under such proceedings. Finally, as a result of international conventions that assist in the

recognition and enforcement of foreign arbitral awards, those awards are frequently recognized and enforced more easily than foreign judicial decisions (see also paras. 56-59).

31. On the other hand, an arbitral award may be set aside in judicial proceedings. The initiation of those proceedings will prolong the final settlement of the dispute. However, under most legal systems, an arbitral award may be set aside only on a limited number of grounds, for example that the arbitrators lacked authority to decide the dispute, that a party could not present its case in the arbitral proceedings, that the rules applicable to the appointment of arbitrators or to the arbitral procedure were not complied with, or that the award was contrary to public policy.

(b) Authority to agree on arbitration

32. There are two possible limits to the freedom to agree to arbitration: one arising from the subject matter to be submitted to arbitration and another one arising from the governmental character of a party to the arbitration agreement. In many legal systems, the traditional position has been that the Government and its agencies may not agree to arbitration. This position has often been restricted to mean that it does not apply to public enterprises with an industrial or commercial character which, in their relations with third parties, act pursuant to private law or commercial law.

33. As noted earlier (see chap.I, "General legislative considerations",____), in some legal systems belonging to the civil law tradition, the provision of public services is governed by a body of law known as "administrative law", which governs a wide range of governmental functions. In many of those countries there are special provisions for the settlement of disputes arising out of government contracts; in particular there may exist prohibitions for the government agencies to agree to arbitration to the exclusion of court jurisdiction. Such restrictions may extend to a varying degree to a range of governmental entities encompassing the legislative, administrative and executive branches. However, there may be differences between a contract entered into by a governmental department and one that is entered into by a government-owned corporation. Also to be taken into consideration is the constitutional division of powers within the host country. In some countries, certain matters fall within the exclusive jurisdiction of a subsidiary political division (i.e. a state or province), whereas two or more political divisions may share jurisdiction in respect of other matters. It may not be possible for one of these governmental divisions to preclude the application of laws that govern matters within the jurisdiction of another division.

34. Limitations to the freedom to agree on arbitration may also relate to the legal nature of the project agreement. Under civil law systems with a special category of administrative law, there may be provisions that classify the project agreements as administrative contracts, with the consequence that they are governed by the administrative law of the host State. Under other legal systems, similar prohibitions may be expressly included in legislation or judicial precedents directly applicable to project agreements. But even where there is no overt prohibition, the same result may be achieved by established contract practices in the area of privately financed infrastructure projects, usually based on legislative rules or regulations. For example, legislation may stipulate that governmental contracts are required to adhere to certain standard forms of contract, which may contain standard clauses, including a standard dispute settlement clause which stipulates the jurisdiction of the courts

of the host country. Therefore, regardless of the type of legal regime under consideration, it is important to determine whether a project agreement will be classified as a governmental contract subject to certain rules, as a private commercial contract subject to the same rules as any other such type of contract, or whether there are special rules that apply to project agreements in general (see also chapter IV, "The project agreement", ___).

35. For countries that wish to allow the use of arbitration for the settlement of disputes arising in connection with privately financed infrastructure projects, it is important to remove possible legal obstacles and to provide a clear authorization for domestic contracting authorities to agree to arbitrate their disputes. The absence of a clear legislative authority to agree on arbitration may give rise to questions as to the validity of the arbitration agreement and cause delay in the settlement of possible disputes. Dealing with allegations of invalidity of an arbitration agreement will in the first instance be in the hands of the arbitral tribunal which will have to decide the validity of the allegation. If the arbitral tribunal finds that the arbitration agreement has been validly concluded despite any subsequent defence that the contracting authority had no authorization to conclude it, the question may reappear at the recognition and enforcement stage before a court in the host country or before a court of a third country where the award is to be recognized or enforced.

36. With regard, in particular, to infrastructure projects involving foreign investors, it may be noted that a framework for the settlement of disputes between the contracting authority and foreign companies participating in a project consortium may be provided by a bilateral investment treaty or by adherence to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965). The Convention, which has thus far been adhered to by 139 States, established the International Centre for the Settlement of Investment Disputes (ICSID). ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is voluntary. However, once the parties to a contract or dispute have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. All ICSID members, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards. ICSID is an autonomous international organization with close links with the World Bank.

(c) Provisions of arbitration agreement

(i) Scope of arbitration agreement and mandate of arbitral tribunal

37. In general, arbitral proceedings may be conducted only on the basis of an agreement by the parties to arbitrate. The agreement may be reflected either in an arbitration clause included in the project agreement or in a separate arbitration agreement concluded by the parties before or after a dispute has arisen. Since it may be more difficult to reach an agreement to arbitrate after a dispute has arisen, it is advisable either to include an arbitration clause in the project agreement or to enter into a separate arbitration agreement at the time of entering into the contract. However, under some legal systems, an agreement to arbitrate is procedurally and substantively fully effective only if it is concluded after a dispute has arisen.

38. It would be advisable for the project agreement to indicate what disputes are to be settled by arbitration. For example, the arbitration clause may stipulate that all disputes arising out of or relating to the project agreement or the breach, termination or invalidity thereof are to be settled by arbitration. In some cases, the parties may wish to exclude from that wide grant of jurisdiction certain disputes that they do not wish to be settled by arbitration.

39. If permitted under the law applicable to the arbitral proceedings, the parties may wish to authorize the arbitral tribunal to order interim measures pending the final settlement of a dispute. However, under some legal systems, arbitral tribunals are not empowered to order interim measures even if so authorized by the parties. Under other legal systems, where interim measures can be ordered by an arbitral tribunal, in many cases they cannot be enforced, although also unenforceable measures are not without practical value. In those cases, it may be preferable for the parties to rely on a court to order interim measures. Under many legal systems, a court may order interim measures even if the dispute is to be or has been submitted to arbitration.

40. It is desirable for the arbitration agreement to obligate the parties to implement arbitral decisions, including decisions ordering interim measures. The advantage of including such an obligation in the project agreement is that under some legal systems, where an arbitral award is not enforceable in the country of a party, a failure by the party to implement an award when obligated to do so by the contract might be treated in judicial proceedings as a failure by the party to perform a contractual obligation.

41. If judicial proceedings are instituted in respect of a dispute covered by an arbitration agreement that is recognized to be valid, upon a timely request the court will normally refer the dispute to arbitration. However, the court may retain the authority to order interim measures and will normally be entitled to control certain aspects of arbitral proceedings (e.g. to decide on a challenge to arbitrators) and to set aside arbitral awards on certain grounds (see paras. 56-59).

(ii) Type of arbitration and appropriate procedural rules

42. The parties are able to select the type of arbitration that best suits their needs. It is desirable that they agree on appropriate rules to govern their arbitral proceedings. There is a wide range of arbitration systems available, with varying degrees of involvement of permanent bodies (e.g. an arbitration institution, professional or trade association or chamber of commerce) or third persons (e.g. a chief officer of a court of arbitration or of a chamber of commerce). At one end of the spectrum is the pure ad hoc type of arbitration, which does not involve a permanent body or third person in any way. This means, in practical terms, that no outside help is available (except, perhaps, from a national court) if, for example, difficulties are encountered in the appointment or challenge of an arbitrator. Moreover, any necessary administrative arrangements have to be made by the parties or the arbitrators themselves. At the other end of the spectrum there are arbitrations fully administered and supervised by a permanent body, which may review terms of reference and the draft award and may revise or make recommendations as to the form of the award.

43. Between these two types of arbitration there is a considerable variety of arbitration systems, all of which involve an appointing authority (or at least a system for the appointment of the appointing authority, as provided for by the UNCITRAL Arbitration Rules). These systems differ as to the administrative services that they provide. The essential, although not necessarily exclusive, function of an appointing authority is to compose or assist in composing the arbitral tribunal (e.g. by appointing the arbitrators, deciding on challenges to an arbitrator or replacing an arbitrator). Administrative or logistical services, which may be offered as a package or separately, could include the following: forwarding written communications of a party or the arbitrators; assisting the arbitral tribunal in organizing hearings and other meetings (including notifying the participants; providing, or arranging for, meeting rooms for hearings or deliberations of the arbitral tribunal; arranging for maintaining a record of hearings and for interpretation during hearings and possibly translation of documents); assisting in filing or registering the arbitral award, when required; holding deposits and administering accounts relating to fees and expenses; and providing other secretarial or clerical assistance.

44. Unless the parties opt for pure ad hoc arbitration, they may wish to agree on the body or person to perform the functions that they require. Among the factors worthwhile considering in selecting an appropriate body or person are the following: willingness to perform the required functions; competence, in particular in respect of international matters; appropriateness of fees measured against the extent of services requested; seat or residence of the body or person and possible restriction of its services to a particular geographic area. The latter point should be viewed in conjunction with the probable or agreed place of arbitration. However, certain functions (e.g. appointment) need not necessarily be performed at the place of arbitration, and certain arbitral institutions are prepared to provide services in countries other than those where they are located.

45. In most cases, the arbitral proceedings will be governed by the law of the State where the arbitration takes place. Many States have laws regulating various aspects of arbitral proceedings. Some provisions of these laws are mandatory; others are non-mandatory. In selecting the place of arbitration, the parties may wish to consider the extent to which the law of a place under consideration recognizes the special needs and features of international commercial arbitration and, in particular, whether it allows the parties to tailor the procedural rules to meet their particular needs and wishes while at the same time ensuring that the proceedings are fair and efficient. A trend in this direction, discernible from modern legislation in a good number of jurisdictions, is being enhanced and fortified by the UNCITRAL Model Law on International Commercial Arbitration, which was adopted in 1985.[2]

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[2] Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), para. 332 and Annex I. The United Nations General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".

46. Since the arbitration laws of some States are not necessarily suited to the particular features and needs of international commercial arbitration, and since, in any case, those laws do not contain rules settling all procedural questions that may arise in relation to arbitral proceedings, the parties may wish to agree on a set of arbitration rules to govern arbitral proceedings. When the parties choose to have their arbitration administered by an institution, the institution usually requires the parties to use the rules of that institution, and would refuse to administer a case if the parties have modified provisions of those rules that the institution regards as fundamental to its arbitration system. Many arbitral institutions offer a choice of two or sometimes more sets of rules and usually allow the parties to modify the rules, in particular those rules that do not interfere with the administration of the arbitration by the institution. If the parties are not required by an institution to use a particular set of arbitration rules or to choose among specified sets of rules, or if they choose ad hoc arbitration, they are free to choose a set of rules themselves. In selecting a set of procedural rules, the parties may wish to consider its suitability for international cases and the acceptability of the procedures contained in them.

47. Of the many arbitration rules promulgated by international organizations or arbitral institutions, the UNCITRAL Arbitration Rules[3] deserve particular mention. These Rules have proven to be acceptable in different legal, social and economic systems and are widely known and used in all parts of the world. Parties may use them in pure ad hoc arbitrations as well as in arbitrations involving an appointing authority with or without the provision of additional administrative services. A considerable number of arbitration institutions in all regions of the world have either adopted these Rules as their own institutional rules for international cases or have offered to act as appointing authority. Most of them will provide administrative services in cases conducted under the UNCITRAL Arbitration Rules.

(iii) Practical matters to be settled by parties

48. The provisions on arbitration in the project agreement or in a separate arbitration agreement should also deal with a number of practical matters, such as: the number of arbitrators who are to comprise the arbitral tribunal; the procedures for appointing the arbitrators; the place where the proceedings are to be held and where the arbitral award is to be issued; the language to be used in the arbitral proceedings.

49. Where a model clause accompanies the arbitration rules or is suggested by an arbitral institution, adoption of that clause by the parties enhances the certainty and effectiveness of the arbitration agreement. Some model clauses, such as the one accompanying the UNCITRAL Arbitration Rules, suggest that the parties settle these practical matters by agreement.

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[3] Report of the United Nations Commission on International Trade Law on the work of its ninth session, Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), para. 57 (Yearbook of the United Nations Commission on International Trade Law, Vol. VII: 1976, part one, II, A (United Nations publication, Sales No. E.77.V.1)). The UNCITRAL Arbitration Rules have also been reproduced in booklet form (United Nations publication, Sales No. E.77.V.6). The use of the UNCITRAL Arbitration Rules has been recommended by the United Nations General Assembly in its resolution 31/98 of 15 December 1976.

(d) Particular issues concerning the implementation of arbitration agreements

50. If it is found desirable to allow the parties the freedom to choose the dispute settlement mechanism, including arbitration, it is advisable to consider whether express legislative authority is required. Such express authority would be needed where, given the tradition of exclusive court jurisdiction in matters of governmental concessions, arbitration is not permitted or it may be uncertain whether the parties to a project agreement are free to agree to arbitration.

(i) Sovereign immunity

51. When arbitration is allowed and agreed upon between the parties to the project agreement, the implementation of an agreement to arbitrate may be frustrated or hindered if the State entity is able to plea State immunity, either as a bar to the commencement of arbitral proceedings or as a defence against recognition and enforcement of the award. Sometimes the law on this matter is not clear, which may raise concerns with the investors and the party concluding a contract with the contracting authority that an agreement to arbitrate might not be effective. In order to allay such possible concerns, it is advisable to review the law on this topic and indicate the extent to which the contracting authority may raise a plea of sovereign immunity.

52. Applying concepts of private law to the extent they may be applied to the question whether State immunity may be raised as a bar to the commencement of arbitral proceedings, or applying principles developed in legislation and case law of some States, an agreement to arbitrate may be regarded as a waiver of the State immunity.

53. Even if the award has been issued against the contracting authority it may raise a plea of immunity from execution against State property. There is a diversity of approaches to the question of State immunity from execution. For example, under some national laws immunity does not cover State entities engaged in commercial activity. In other national laws a link is required between the property to be attached and the claim in that, for example, immunity cannot be pleaded in respect of funds allocated for economic or commercial activity governed by private law upon which the claim is based or that immunity cannot be pleaded with respect to assets set aside by the State to pursue its commercial activities. In some States it is considered that it is for the State to prove that the assets to be attached are in non-commercial use.

54. In some contracts involving entities that might plea sovereign immunity, clauses have been included to the effect that the State waives its right to plea sovereign immunity. Such consent or waiver might be contained in an international agreement or the consent may be limited to recognizing that certain property is used or intended to be used for commercial purposes. Such written clauses have been used inasmuch as it is not clear whether the conclusion of an arbitration agreement and participation in arbitral proceedings by the State entity constitutes an implied waiver of sovereign immunity from execution.

55. The legislator may wish to review its laws on this matter and, to the extent considered advisable, clarify in which areas State entities may not plea sovereign immunity.

(ii) Enforceability of the award

56. The effectiveness of an agreement to arbitrate depends also on legislation governing the recognition and enforcement of arbitral awards. These legislative provisions have been harmonized by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),[4] which, inter alia, deals with the recognition of an arbitration agreement and the grounds on which the court may refuse to recognize or enforce an award. The Convention has been adhered to by a large number of countries and is widely regarded as providing an acceptable and balanced regime for the recognition and enforcement of arbitral awards. The fact that the host country is a party to the Convention is likely to be seen as a crucial element in assessing the legal certainty of binding commitments and of the reliability of arbitration as a method for solving disputes by arbitration with parties from the country.

57. According to its article I, the Convention applies to the recognition and enforcement of awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". Thus, if the place of arbitration is in the host country, the courts of that country will normally not apply the Convention to awards made there even if the host country is a party to the Convention. The applicability of a recognition and enforcement regime other than that of the Convention may be seen as a factor increasing the uncertainty of arbitration as a dispute settlement mechanism. In order to avoid that uncertainty, the project company may be interested in reaching an agreement with the contracting authority that any arbitration take place in a country other than the host country.

58. In order to increase the attractiveness of the host country as the venue for arbitration, the legislator may decide to adopt a regime for the recognition and enforcement of arbitral awards made in the State that is essentially the same as the regime set forth in the Convention. Such a regime is contained in the UNCITRAL Model Law on International Commercial Arbitration, which is closely modelled on the 1958 New York Convention and which applies to all awards whether they have been made in the enacting State or in a foreign State. The internationally harmonized wording of the relevant provisions of the Model Law will increase the transparency of the law in the host country on this point.

59. The applicability in the host country of the 1958 New York Convention and the regime modelled on that Convention for the awards not covered by the Convention does not eliminate all possibilities of frustrating recognition and enforcement of an award issued in the host country. This is because a party may apply to the courts of the place where the award has been made to set aside

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[4] See United Nations Treaties Series, Vol. 330, p. 38, No. 4739 (1959), reproduced in Register of Conventions and other Instruments concerning International Trade Law, Vol. II (United Nations publication, Sales No. E.73.V.3).

the award. The effectiveness of arbitration will thus also depend on the legislative regime for the setting aside of awards in the country where the arbitration takes place. If that regime in the host country is seen as unsatisfactory, in particular if it allows an award to be set aside for reasons that go beyond those widely regarded as acceptable for international commercial arbitration, a party might, for that reason, wish to agree on a place of arbitration outside the host country. In order to reassure all parties and in particular private investors that an award made in the host country will not be set aside for exorbitant reasons, the host country may wish to consider adopting a regime that is widely regarded as appropriate for international commercial cases. Such a regime is contained in the UNCITRAL Model Law on International Commercial Arbitration.

6. Judicial proceedings

60. Apart from the question of how the matter is regulated by law, in considering whether any dispute should be resolved in judicial proceedings or whether an arbitration agreement should be entered into, factors typically taken into account by the parties include, for example, their confidence that the courts competent to decide a dispute will be unbiased and that the dispute will be resolved without inordinate delay. The efficiency of the national judicial system and the availability of forms of judicial relief that are adequate to disputes that might arise under the project agreement are additional factors to be taken into account. A potential for delay in court proceedings may arise in particular from the possibilities of recourse against a court decision. Furthermore, in view of the fact that infrastructure projects usually involve highly technical and complex issues, the parties will also consider the implications of using arbitrators selected for their particular knowledge and experience as compared to the judicial system which is typically not based on the idea that a dispute should be entrusted to a judge that has the specific prior knowledge or experience in the area where the dispute arose. Another consideration may be the confidentiality of arbitration proceedings, relative informality of arbitral procedures, and the possibly greater flexibility arbitrators may have in awarding appropriate remedies, all of which may be beneficial for preserving and developing the long-term relationship implicit in project agreements.

61. The contracting authority may see several reasons for leaving any dispute to be resolved by the courts of the host country. Those courts are familiar with the law of the country, which often includes specific legislation directly applicable to the project agreement. Furthermore, the contracting authority and other governmental agencies of the host country that might be involved in the dispute may prefer local courts because of the familiarity with the court procedures and the language of the proceedings. It may also be considered that, to the extent project agreements involve issues of public policy and the protection of public interest, state courts are in a better position to give them proper effect.

62. However, such a view by the contracting authority is often not shared by the project company, investors, financiers and other private parties involved in the project. These parties may be concerned that a court of the host country might be biased in favour of the contracting authority or that in court proceedings short term policies or political considerations might prevail over the legitimate interests of the private investors. They may also consider that arbitration is preferable to judicial proceedings because arbitration, being to a larger degree subject to agreement of the parties

than judicial proceedings and not subject to lengthy appeals, is in a position to resolve a dispute more efficiently. Another reason may be that a number of persons on the side of the project company may not be familiar with the language of the court proceedings, which would be a hindrance in their participation in court proceedings.

63. Some countries, including those with a tradition of exclusive jurisdiction of courts in issues arising from governmental concessions, have concluded that there are no compelling reasons of public interest for not allowing the parties to the project agreement to agree on the dispute settlement mechanism they consider the most appropriate. In some countries it was also found that allowing the parties to choose the dispute settlement mechanism helped to attract foreign investment for the development of its infrastructure.

64. However, according to other laws, agreement to arbitrate is not allowed, with the result that the provisions on competence of courts of the host country apply. In countries where Government contracts are subject to such a special regime, it may be advisable for the legislature to review the adequacy of the provisions on dispute settlement for privately financed infrastructure projects.

C. Settlement of commercial disputes

1. General remarks

65. In addition to the project agreement, there are various other contracts involved in a privately financed infrastructure project. The legislative considerations underlying any regulation of dispute settlement mechanisms would depend on the types of contract and the characteristics of disputes that may arise therefrom. These contracts would typically include the following: (a) agreements and corporate instruments entered into by project sponsors; (b) financing and related agreements; (c) construction contracts; (d) operation and maintenance contracts; (e) contracts for the supply of goods and services needed for the operation and maintenance of the facility.

66. It is generally accepted in national laws that parties to commercial transactions, and in particular international commercial transactions, are free to agree on the forum that will decide in a binding decision any dispute that may arise from those transactions. In international transactions, arbitration has become the preferred method, whether or not it is preceded by, or combined with, conciliation. As to contracts usually forming part of privately financed infrastructure transactions, in many countries the parties are free to subject disputes to arbitration, to select the place of arbitration and to determine whether or not any arbitration case should be administered by an arbitral institution. This is true in particular for the types of contract mentioned in the preceding paragraph. These contracts are generally considered commercial agreements to which, as regards disputes settlement clauses, general rules regarding commercial contracts are applicable. Governments wishing to establish a hospitable legal climate for privately infrastructure projects would be advised to review their laws with respect to these contracts so as to eliminate any uncertainty regarding the freedom of the parties to agree to dispute settlement mechanisms of their choice.

2. Specific types of contracts and disputes

(a) Agreements and corporate instruments entered into by project sponsors

67. These agreements may include, in addition to the instruments of incorporation of the project company, for example, various shareholders' agreements, agreements regarding the provision of additional financing or arrangements regarding voting rights. Parties to these instruments and agreements typically have a strong tendency to resolve their disputes by voluntary conciliation rather than in formal arbitral or court proceedings.

(b) Financing and related agreements

68. Since only a minor part of financing is provided directly by project sponsors and the rest is obtained from various lenders and investors, a number of credit agreements, export credit arrangements and other financing instruments are entered into with parties such as commercial banks, governmental lending institutions, international lending institutions and export credit insurers. The lenders pay particular attention to legal certainty, enforceability of financial obligations as well as to legal validity of security arrangements. Lenders have a tendency of favouring agreements that submit any disputes arising out of these agreements to the court jurisdiction of international financial centres. However, lending instruments in some privately financed infrastructure projects have provided for arbitration as a method for settling these types of disputes.

(c) Construction contracts

69. Contracts for the construction of the facility are often concluded by the project company on a turnkey basis, either with one contractor or a consortium of contractors, under a single contract or several contracts.[5] Members of the consortium of contractors may in turn enter into a number of additional agreements among themselves regarding, for example, the supply of equipment and the provision of various services.

70. Experience shows that construction contracts are particularly prone to disputes and these disputes present problems that do not often exist in other types of contract. This is due, for example, to the technical complexity of these contracts, the number of different enterprises that participate in the construction, need for variations or far-reaching consequences of mistakes.

71. It is often desirable for disputes arising under construction contracts to be settled by arbitration. However, certain disputes that may arise under the construction contracts are not within the legal competence of courts or arbitral tribunals or cannot conveniently be settled in arbitral or judicial proceedings (for example, disputes of a technical nature that need to be resolved more speedily than is possible in arbitral or judicial proceedings). The parties may wish to provide for

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[5] For a description of contracting approaches in the construction industry, see the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*, chapter II.

such disputes to be dealt with by a third party, such as a referee or a dispute review board (see also paras. 21-29).

72. Disputes involving several enterprises may arise in connection with the construction. For example, where the project company alleges that the construction is defective, it may be uncertain which of several contractors engaged by it is liable. If the project company pursues individual claims against each contractor and those claims are settled in separate proceedings by different courts or arbitrators, those proceedings may result in inconsistent decisions. This could occur even if the same law governs all of the contracts and could result, for example, from the application of different procedural rules or from different evaluations of the relevant evidence. Settlement of all related claims in the same proceedings could prevent inconsistent decisions, facilitate the taking of evidence, and reduce costs. However, multi-party proceedings tend to be more complicated and less manageable, and a party may find it more difficult to plan and present its case in such proceedings. Many legal systems provide means for disputes involving several parties to be settled in the same multi-party judicial proceedings. In order to enable disputes involving several enterprises to be settled in multi-party judicial proceedings, it may be desirable for all contracts entered into by the project company for the construction of the works to contain a clause conferring exclusive jurisdiction on a court which has the power to conduct multi-party proceedings. It is more difficult to structure multi-party proceedings when arbitration is to be used for the settlement of disputes. However, some of the benefits of multi-party proceedings might be achieved if the same arbitrators were appointed to settle disputes arising under all contracts concerning the construction of the works.

73. Under some legal systems, a party seeking to consolidate arbitral proceedings before one single arbitral tribunal may file an application for that purpose to a court. In most of those legal systems such an application must be based on the consent of all parties concerned. In some of these jurisdictions, application for consolidation can be made to the arbitral tribunal or tribunals concerned. The requested arbitral tribunals may confer with each other with a view to making consistent orders for consolidation. If an order for consolidation is not made, or if inconsistent provisional orders by the arbitral tribunals involved are made, any party may apply to the court, which will decide on consolidation. In most legal systems that contain specific provisions on this matter, a consolidation order can be made where there is a common question of law or fact, that the rights to relief claimed arise out of the same transaction or that for some other reason a consolidation order is desirable.

(d) Contract or contracts between the project company and the party who operates and maintains the project facility

74. Disputes arising from contracts for the operation and maintenance of the project facility frequently present problems that do not often exist in disputes arising under other types of contracts. This is due to their complexity, the fact that they are to be performed over a long period of time and the fact that a number of enterprises may participate in the operation and maintenance of the project. In addition, there is a strong public interest in the timely and proper performance of these contracts. Disputes under these contracts often concern highly technical matters connected with the construction processes and with the technology incorporated in the project. It is particularly important that they be settled speedily in order not to disrupt the maintenance of the facility or the provision of the public

service. These considerations ought to be taken into account by the parties in determining the most suitable dispute settlement mechanisms.

75. As with disputes that relate to the construction phase, disputes arising in connection with the operation of the infrastructure, too, may involve several enterprises and the earlier considerations concerning multi-party proceedings would also apply *mutatis mutandis* in this context (see paras. 72-73).

(e) Contracts for the supply of goods and services needed for the operation and maintenance of the facility

76. Contracts for the supply of goods and services needed for the operation and maintenance of the facility, as usual commercial contracts, do not pose any particular considerations in the context of privately financed infrastructure projects. However, to the extent that a governmental agency of the host country is a party to any of these contracts, considerations similar to those concerning disputes between the contracting authority and the concessionaire (see paras. 4-64) may also be relevant in this context.

D. Disputes involving other parties

1. Disputes between the concessionaire and its customers

77. Depending on the type of project, the concessionaire's customers may include various persons and entities, such as, for example, a government-owned utility company that purchases electricity or water from the concessionaire so as to resell it to the ultimate users; commercial companies, such as airlines or shipping lines contracting for the use of the airport or port; or individual persons paying for the use of a toll road. The considerations and policies regarding contracts with the end-purchasers of the goods or services supplied by the project company depend on who are the parties to those contracts. If the end-users are utility companies or commercial enterprises, the parties would settle any disputes by methods usual in trade contracts, including arbitration. If, however, the users are consumers, i.e. individual persons acting in their non-commercial capacity, special considerations may apply. For example, in some countries it was considered desirable to establish by law an obligation to make available to consumers special simplified and efficient mechanisms for settling disputes with the operator of the facility. Where such special mechanisms exist, it is often provided that the mechanisms are optional without prejudice to the consumers' access to courts.

78. In some countries provisions exist regulating disputes between providers of public services, such as utilities, and purchasers or users of those services. Such special regulation is typically limited to certain industrial sectors and applies to purchases of goods or services by individual consumers; the regulation, for example, provides an obligation of the supplier to establish a mechanism for receiving and dealing with complaints by individual consumers and in some cases also for simplified methods for settling disputes. These methods may include arbitration and conciliation. Typically, such mechanisms are optional for the consumer and do not preclude resort by the aggrieved persons

to courts. Where the purchasers or users are commercial entities, it is usually considered that there is no need for specific regulation of the settlement of disputes.

79. The need for such special provisions in the area of privately financed infrastructure projects and the nature of dispute settlement mechanisms provided for depend on considerations such as the types of goods or services involved, the entities or persons purchasing them and the policies underlying various industrial sectors. It therefore appears advisable to leave any such regulation to sector specific laws or to regulations issued pursuant to such laws.

2. Procedures for solving disagreements between the regulatory body and the concessionaire

80. As noted earlier (see chap. V, "Infrastructure development and operation", ___), during the operational phase of the project the project company will have to comply with a wide variety of conditions and standards for the operation and maintenance of the facility, which are spelled out in the law, regulations or the project agreement. In addition to those obligations, many countries have established a regulatory regime whereby the contracting authority or an independent regulatory body exercises an oversight function over the operation of the facility and the compliance by the project company with the various conditions, standards and decisions taken by the regulatory body. Such regulatory regimes are usually established for particular industrial sectors, such as power generation, water treatment and sanitation or public transportation.

81. The main features of various regulatory systems, institutional mechanisms and regulatory procedures, including the issue of autonomy of the regulatory body vis-à-vis the Government, have been discussed elsewhere in the *Guide* (see chap.I, "General legislative considerations", ___). Irrespective of whether the primary regulatory decisions are made by a governmental department (such as a ministry) or an independent regulatory body, there is a need for a mechanism whereby the operator of the facility may request a review of regulatory decisions in case of disagreements between the regulatory body and the operator. As with the whole regulatory process, a high degree of transparency and credibility is essential. To be credible, the review should be entrusted to an entity that is independent from the regulatory body taking the original decision, from the political authorities of the host country and from the regulated companies.

82. In many legal systems, review of decisions of regulatory bodies is in the jurisdiction of courts. However, if there are concerns over the judicial process of review (e.g. as regards possible delays or the capacity of courts to make evaluations in complex economic issues involved in regulatory decisions) it may be more appropriate to entrust review functions to another body, at least in the first instance, before a final recourse to courts. In some countries, requests for review are considered by a high-level cross-sectoral independent oversight body. There are also countries where requests for review are heard by a panel composed of persons holding specified judicial and academic functions. As to the grounds on which a request for review may be based, in many cases there are limits, in particular as to the right of the appellate body to substitute its own discretionary assessment of facts for the assessment of the body whose decision is being reviewed.

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